though rent be paid, does not raise the presumption of any demise by the superior landlord.[1]

§ 10. Where lodgings and apartments are let, the lessor impliedly grants the use of every thing necessary to the enjoyment of the principal subject of the demise, the staircase, door-bell, etc.; and the tenant can bring an action for the breach of the contract, if he is deprived of their use.[2] Upon the letting of ready-furnished rooms, there is an implied contract that they shall be reasonably fit for occupation, and the tenant may quit without notice, if they are not.[3] And if a house become uninhabitable, tenant may quit without paying rent.[4] Notice to quit is unnecessary, in the case of weekly or monthly tenancy of apartments, unless there be some agreement between the parties, or local custom which renders it necessary.[5] And if notice is requisite, nothing can justify a tenant in quitting without notice.[6] Where rooms are hired in a building, with no stipulation in the lease for rebuilding in case of fire or other casualty, either by lessor or lessee, if the building is destroyed, the tenancy is determined.[7] The rule, that where there is a general demise for no specific time, a tenancy from year to year is created, does not apply where lodgings are thus let.[8]

RECENT AMERICAN DECISIONS.

In the Supreme Court of New York.

CUMBERLAND COAL AND IRON COMPANY *vs.* SHERMAN, DEAN AND POSTLEY.

1. It may be considered as settled law, that all trustees, as well public as private, are incapable of purchasing the trust property for their own benefit, either directly or indirectly.

2 A trustee cannot contract with himself, or with several trustees of which he is one, or with a board of trustees of which he is one, without having his contract liable to be set aside, if in any reasonable time his *cestui que trust* chooses to say he is not satisfied with it.

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[1] 1 C. M. & R. 261; 4 Tyr. 781. [2] 7 C. & P. 28. [3] 11 M. & W. 5.
[4] 5 C. & P. 230; 7 D. & R. 117. [5] 7 C. & P. 56. [6] 6 C. & P. 56.
[7] 11 Metc. 448. [8] Mansfield, C. J., 1 T. R. 159.

3. A trustee who purchases directly from his *cestui que trust*, who is *sui juris*, or whose contract is afterwards confirmed by the *cestui que trust*, must act in every particular with fairness and entire candor; either the *suppressio veri*, or the *suggestio falsi* will avoid the sale or contract.
4. Hence, where A was a director and manager in one corporation, and made a contract with such corporation on behalf of and for another corporation wherein B was the ostensible and active manager, but A, himself the real and effective party, by which contract substantial benefit was conferred upon the latter corporation by withholding some material facts from the stockholders of the former corporation by which they were induced to confirm A's contract, it was held, that such contract could not be sustained, and an injunction was granted.
5. A full discussion and citation of the cases and text books wherein the above principles are enunciated.

The plaintiffs are a corporation created by the laws of the State of Maryland, for the purpose of mining coal, transporting and selling the same, &c. On the 21st of February, 1855, the defendant Sherman was elected a director of the company, and continued to act as such until the 29th of May, 1858, when he resigned.

The complaint in this cause was filed December 6, 1858, against the above named defendants, Sherman and Dean, and the Hoffman Coal Company, a corporation also created by the laws of the State of Maryland. It has since been amended, by striking out as parties defendants, the Hoffman Coal Company; and the defendant Postley has been made a defendant by a supplemental complaint.

The complaint alleges, that Andrew Mehaffey was president of the plaintiffs, from 20th March, 1854, to June 7th, 1858, and acted as treasurer, until May 1st, 1858; that defendant Sherman, on April 4th, 1855, was appointed chairman of a committee to prepare by-laws; that as such, at a meeting of the stockholders June 4th, 1855, he reported certain by-laws, which were adopted, whereby an executive committee was constituted, consisting of three directors, and the president was vested with the exclusive power of constituting said committee; that the same was appointed, composed of said Sherman, Francis Bloodgood and Joseph Torrey, and the president was made *ex-officio* a member of said committee, and chairman thereof; and said committee continued to act until 29th May, 1858; that said Sherman took an active, leading and influential part in the affairs of said company; and that said executive committee assumed to transact most of the ordinary business of the company.

That at a meeting of the Board of Directors of the company on the 9th of October, 1855, he, Sherman, offered a resolution, which was adopted, authorizing the president to appoint a committee of five directors, whose duty it was made to proceed to Maryland and ascertain how much and what part of their coal lands could be sold without interfering with the working facilities of the company; and, if practicable, that they set off by metes and bounds such portions as they in their judgment should deem advisable, and report their proceedings to the Board at the earliest practicable day; that said Mehaffey, as such president, appointed said Sherman chairman of said committee, and appointed as the other members thereof Joseph Torrey, M. N. Falls, William Pettet and Francis Bloodgood; that said Mehaffey was added to said committee as a member thereof; that the only members of the committee who acted, were said Sherman, Pettet and Mehaffey; and that they visited the lands of the company for the purpose indicated in the resolution. That at a meeting of the Board on the 11th December, 1855, the said committee, in the name of Sherman, as their chairman, presented a report, stating that three of their members had visited said mines, leaving New York on the 19th of November, and had examined the same, and recommended a sale of 1548½ acres, which they had described by sufficient metes and bounds for a conveyance by deed. They thought the same might be sold at a fair price, and upon such terms as would enable the company to make all necessary arrangements for the development of the resources of the company.

That at the same meeting of the directors of the company, a resolution was passed, authorizing the president and secretary to accept an offer, should such be made, of not less than $200,000 for the lands referred to in the report, and to convey the same by deed to the purchaser or purchasers, with such reservations, stipulations and covenants as they might deem necessary.

At a meeting of the directors, on the 15th January, 1856, a resolution was passed, reciting that the stockholders had authorized and directed a sale to be made of part of the company's lands; that it was believed a sale of a portion of them would be advantageous to the company, and that the board, by resolution of December, 11,

1855, had authorized a sale of a portion of such lands at a certain price, which had been found impracticable, and it was understood that a sale could be made of a less quantity, for $150,000 or thereabouts; therefore, it was resolved, that the president and secretary be authorized to make such sale, by executing a deed of the land to be sold, and make and execute such covenants and agreements on the behalf of the company, as they might deem necessary; and the president was authorized to make such modifications in the terms and conditions of the sale as he might deem necessary. That on the 22d of April, 1856, a deed was executed to said Sherman and Dean, by said company, conveying to them 1,215 acres of said lands, for the price or consideration of $140,000; of which $28,000 was stated in the deed to have been paid to the company, and the balance $112,000, by the said Sherman and Dean assuming to pay 112 bonds of the company of 1,000 dollars each, the payment of which had been extended to January 1, 1864, with interest thereon at the rate of six per cent., payable semi-annually. An agreement was also executed on the part of the company, of the same date as the deed, with the said Sherman and Dean, securing to them important advantages in the use of the railroad, and other property of the company.

At a meeting of the Board of Directors, 13th May, 1856, it appears from their minutes that the president stated that a sale of a certain portion of the lands of the company had been made to Sherman and Dean, and two agreements and the deed for the lands had been executed, and the action of the president and secretary in the matter was unanimously approved.

The complaint charges that the price at which said lands were sold was grossly inadequate, and that no part of the consideration therefor was ever paid to the said plaintiffs.

The complaint further charges, that the rates of transportation provided in said contract to be paid by said Sherman and Dean, afford no compensation whatever for the services rendered; the said rates are, in fact, less than the actual expenses of the railroad, in doing the work, and that every ton of coal transported, according to said rates, is an injury and loss to the plaintiffs.

The complaint further charges, that Mehaffey, the president of the company, falsely and fraudulently stated, in his report of June 3, 1856, made to the meeting of the stockholders then held, that the $140,000, being the consideration of said sale, had been paid in cash, and that he had appropriated $112,000, part of the proceeds of said sale, to the extinguishment of that amount of bonds of the company, leaving of the $467,000 of bonds of the company, $355,000 as the *entire* debt of the company. That the said Sherman, in connection with the defendant Postley and three others, on the 19th of August, 1858, organized a company under the laws of Maryland, for the mining and transportation of coal, called the Hoffman Coal Company, and that on the 20th day of August, 1858, the said Sherman and his wife, and said Dean, conveyed said lands, so conveyed to them by the plaintiffs by deed dated April 22, 1856, to said Hoffman Coal Company, and had executed, or were about to execute, an assignment to said Hoffman Coal Company, of said transportation contract.

That said Sherman and Dean became subscribers to 4,990 shares of the capital stock of said Hoffman Coal Company, which capital consisted of 5,000 shares of $100 each, and that the other ten shares were held nominally by the other persons named, to make them directors.

The said company had full notice of all the acts and transactions of said Sherman and Dean, in obtaining said deed and contract, and that although the same were nominally transferred to said company, the said Sherman and Dean in fact continued to own the same.

Wherefore the plaintiffs demanded judgment that said deed and contract might be declared fraudulent and void as to them, and that the same be delivered up to be cancelled, and that in the meantime, and until the final hearing of this cause, the said Sherman and Dean be enjoined and restrained from selling or conveying the same, and otherwise as prayed for in the complaint. The supplemental complaint states that the defendant Postley is president of the said Hoffman Coal Company, and has possession of said deed and contract. That said Dean is a clerk in an office with the said William

Pettet, or in some way connected in business with him; that the said Dean is a man of little or no pecuniary responsibility, and that he holds his interest in said deed, contract, and in said Hoffman Coal Company, in secret trust for some of the directors of the plaintiff, at the time said deed and contract were executed.

On the complaint, a temporary injunction was granted, and an order to show cause why the same should not be continued until the hearing of the cause.

On this motion, affidavits have been read on the part of the defendants Sherman, Dean, and Postley.

All the allegations of fraud charged in the bill are denied. The sale and conveyance to Sherman and Dean are admitted, and the making of the contract for transportation. Sherman and Dean both say that they did not know each other till they met to consummate the arrangements, and execute the contract.

There is no denial in the opposing affidavits, of the charge in the complaint, that the price at which said lands were sold was grossly inadequate.

The affidavits allege that at a meeting of the stockholders on the first of June, 1857, the said sale of said lands and said contract were ratified by said stockholders, except in some particulars, which were modified at the suggestion of some of said stockholders, by said Sherman and Dean.

The affidavits do not deny the allegation of the complaint, as to the report made by Mehaffey to the meeting of the stockholders in June, 1856, that the consideration of the deed, being $140,000, had been paid in cash, and that with a portion of it he had extinguished $112,000 of the bonds of the company; nor do said affidavits allege that previous to said ratification or approval, the truth in that respect had been communicated to the stockholders, or was known to them.

The affidavits allege that said Sherman was solicited by several of the stockholders to become the purchaser of said lands, and that they could not have been sold, if he had not been willing to join in the purchase. Sherman states that he is a man of pecuniary responsibility, but no allegation is made in the affidavits as to the means

or responsibility of Dean. There is no denial of the allegations of the complaint, as to the formation of the Hoffman Coal Company, of the amount of its capital stock, and of the proportions thereof held by the defendants, Sherman and Dean.

C. A. Rapello and *S. J. Tilden*, for motion.
L. R. Marsh and *E. W. Stoughton*, in opposition.

The opinion of the court was delivered by

DAVIES, J.—The question presented for my decision, is whether I will dissolve the preliminary injunction granted in the cause, or continue the same till the hearing.

If the plaintiffs have made out a *prima facie* case for the relief asked for in the complaint, they are entitled to the remedy asked for; or, in the language of § 219 of the code, if it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission of some act, the commission of which, during the litigation would produce injury to the plaintiff, a temporary injunction may be granted to restrain such act.

The solution of the question depends upon the fact whether or not the plaintiffs have made out an apparent right to the relief demanded.

They insist that they have. That it appearing that the defendant Sherman was, at the time he became the purchaser of the lands conveyed by deed of April 22, 1856, and of the privileges and advantages secured by the contract of the same date, the agent and trustee of the plaintiffs, he was not competent to purchase said land; and by reason of such inability, the plaintiffs have the legal right to have said deed and contract cancelled, and said lands re-conveyed to them, and be restored to all things which they have lost by reason of the acts of their agent and trustee, in making said sale and contracts. That the defendant Dean is a representative man, having no personal interest in the matter, and that he took title and became a party to the contract, knowing the relation of the defendant Sherman to the plaintiffs; and that in fact he paid nothing on account of such purchase, and incurred no liability in reference

thereto, beyond uniting with the defendant Sherman in guarantying 112 bonds of the plaintiffs for $1,000 each, and assuming the payment of the principal when due, and the interest thereon.

That the defendant Postley is the president of the Hoffman Coal Company, and that said company took the conveyance of said lands and the assignment of said contract, with full notice of all the facts and circumstances attending the obtaining them from the plaintiffs.

From the facts not denied before me, it appears that Sherman organized the Hoffman Coal Company in August, 1858, and that he became one of its directors, and he and Dean owned 4,990 shares of the 5,000 shares of its capital stock.

It is therefore too clear to need illustration, that whatever knowledge they had of these transactions, the Hoffman Coal Company had. They were its creators; they breathed into it life, and gave it all it had, and owned the whole of it at its creation, and all but a small fragment after; and therefore what they knew, their creature knew.

It is well settled that notice to either of the directors of a bank or company, while engaged in its business, is notice to the principal, the bank. (Angell & Ames on Corporations, 299, and cases there cited.) So, also, it is well settled, both in law and in equity, that notice to an agent in the transactions for which he is employed, is notice to the principal; and this rule applies as well to a corporation as to a natural person. (Same authority.) With much more force does the rule apply, when the principal, in this case, the stockholders, have full and ample notice. It must therefore be assumed that the defendant Postley, as president of the Hoffman Coal Company, stands in no better position before this court than the other defendants.

Next, as to the defendant Dean. It appears from his statement, and that of the defendant Sherman, that the sale, terms, price, and all the arrangements, were concluded, and the contract drawn and agreed upon, and all the papers ready for execution, before Sherman and Dean became acquainted with each other; and that acquaintance was first made when they met for the execution of the papers. It is charged in the complaint, that Dean has never paid anything

to the plaintiff on account of said purchase, and that, as alleged in the supplemental complaint, and not denied, he is a clerk, and a man of little or no pecuniary responsibility. It would appear that at this meeting to sign these papers, he entered into a guaranty with the defendant Sherman, with whom, before, he was totally unacquainted, to guaranty with him, and did guaranty, the payment of $112,000 of the bonds of the plaintiffs, and the payment of the annual interest thereon for eight years; and which interest amounted in all to the sum of $53,760. The readiness with which he entered into liabilities to such an amount, with a total stranger, gives countenance to the allegation that he was a man of little or no pecuniary responsibility.

It is also alleged in the complaint, and not denied, that whatever has been paid on account of said purchase money, was paid by the defendant Sherman. I have no hesitation in arriving at the conclusion, from all the facts before me, that if Dean entered into these transactions on his own account, he did so with full knowledge of the relation of the defendant Sherman to the plaintiffs, and if he acted as the mere agent of others, his principals must have been cognizant of every particular connected with the sale and purchases, if they were not, in fact, actors in them. Dean, in his affidavit, read on this motion, says: "that he had no acquaintance, consultation or communication with the defendant Sherman, until the bargain was made and the terms concluded for the purchase of the said property, conveyed by said deed of 22d of April, 1856, and the said transportation contract of same date, nor until the parties came together to have the same executed."

Dean denies all fraud on his part, or knowledge that any was perpetrated by the defendant Sherman; but I cannot resist the conviction that he knew, and, if he acted for others, that they well knew that Sherman was, at the time, a director of the plaintiffs.

The rule in reference to the dealings of an agent or trustee, in reference to property committed to his management or care, is clearly and well laid down by Sir Edward Sugden, in his work on Vendors and Purchasers. 2 Sug. 109, Lond. ed. of 1824. It is in these words: "It may be laid down as a general proposition, that

trustees, unless nominally such to preserve contingent remainders, agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of the sale, or any person who by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, *are incapable* of purchasing such property themselves, except under the restraints which will shortly be mentioned. For, if persons having a confidential character, were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information and not to exercise it for the benefit of the persons relying upon their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*"

Mr. Justice Wayne, of the Supreme Court of the United States, in *Michoud* vs. *Girod*, 4 How. 554, in delivering the opinion of the court, cites this rule with approbation, and says: "It has been adopted by almost every subsequent writer, and we cite the passage with confidence, having verified its correctness by an examination of all the cases cited by him; by an examination also of other cases in the English courts, and of cases in the Courts of Chancery of several of the States in our Union, sustaining the doctrine, *to the fullest extent*, of the incapability of trustees and agents to purchase particular property, for the sale of which they act representatively, or in whom the title may be for another."

He adds, in the same case, that "the general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them, which imposes on the one a duty to protect the interests of the other; from the faithful discharge of which duty, his own personal interests may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the

motives of self interest; but it provides against the probability, in many cases, and the danger, in all cases, that the dictates of self-interest will exercise a predominant influence and supercede that of duty. It, therefore, prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or the buyer on his own account, are directly in conflict with those of the person on whose account he buys or sells." 2 Burge's Com. 459.

The cases in reference to the dealings of an agent or trustee with the property, in reference to which his agency or trust exists, may be arranged into two classes:

First.—Cases in which a trustee buys or contracts with himself, or several trustees of which he is one, or a board of trustees of which he is one; and it will be seen by reference to the authorities hereinafter cited, that the incapacity to purchase applies to all these cases.

Second.—Cases in which a trustee buys of or contracts with his *cestui que trust* who is *sui juris*, and is competent to deal independently of the trustee, in respect to the trust estate.

As to the first class of cases, the purchase or contract is voidable at the option of the *cestui que trust*, without reference to the fairness or unfairness of the purchase or contract. For the reasons before given, the disqualification of the party purchasing or contracting is a conclusion of law, and is absolute.

The leading case in this State, and which has been followed without qualification, so far as I have been able to ascertain, is that of *Davoue* vs. *Fanning*, 2 Johns. Chan. Rep. 252.

In that case, an executor, on making sale of the real estate of his testator, caused the same to be purchased for his wife, and conveyed to her. The sale was made at public auction and for a fair price, and was *bona fide*. Yet the sale was set aside at the instance of the *cestui que trust;* and it will be observed that the trustee was not the purchaser, but a third person for the benefit of his wife.

Chancellor Kent says, "whether a trustee buys-in for himself or

his wife, the temptation to abuse is nearly the same. Though the money he was raising was to go to his wife, it was no reason why he should be permitted to buy-in for her the *estate itself.* His interest interfered with his duty. * * * The case, therefore, falls clearly within the spirit of the principle, that if a trustee, acting for others, sells an estate, and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here, *as of course,* and set aside that purchase, and have the property re-exposed to sale."

Chancellor Kent then proceeds to review the cases bearing on this point, commencing with that of *Holt* vs. *Holt,* in the time of 22 Car. 2d, where it was held that if an executor renew a lease in his own name on its expiration, the renewed lease was to be for the benefit of the *cestui que trust.*

And in *Davison* vs. *Gardner,* in 1743, Lord Hardwicke observed, that the court always looks with a jealous eye at a trustee purchasing of his *cestui que trust;* and in *Whelpdale* vs. *Cookson,* in 1747, 1 Vesey 9, S. C.; 5 Vesey, 682, the Chancellor would not permit a purchase at auction to stand, as he said he knew the dangerous consequence of sanctioning dealings of a trustee with the property of the *cestui que trust.* In *Campbell* vs. *Walker,* 5 Ves. 678, the Master of the Rolls says, "I will lay down the rule as broad as this, and I wish trustees to understand it, that any trustee purchasing trust property is liable to have the purchase set aside if, in any reasonable time, the *cestui que trust* chooses to say he is not satisfied with it." He adds, "they must buy with that clog."

The numerous cases cited by Chancellor Kent, show the uniformity of the rule, not only in English courts, but in our own and those of sister States. The rule in this State has been settled by the highest Court therein. In *Munro* vs. *Allaire,* 2 Caine's Cases in Error, 183, Benson, J., in delivering the opinion of the court, says: "It is a principle, *that a trustee can never be a purchaser,* and I assume it as not requiring proof that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud, and those dangerous consequences which would ensue if trustees might themselves become

purchasers, or if they were not in every respect kept within compass. Although it may, however, seem hard that the trustee should be the only person of all mankind who may not purchase, yet, for the very obvious consequences, it is proper that the rule should be strictly pursued and not in the least relaxed." Chancellor Kent says, that he cannot but notice the precision and accuracy with which the rule and the reason of it are here stated.

Chancellor Kent says that there is one more important case, that of the *York Building Company* vs. *Mackenzie*, decided in the House of Lords in 1795, on appeal from the Court of Sessions in Scotland. It had then only appeared in 8 Bro. P. C. by Toml. (in App.) but has since been reported in 3 Paton, 378. He says of this case, that it is a complete vindication of the doctrine he was there applying, and he remarks that, considering the eminent character of the counsel who were concerned, and who had since filled the highest judicial stations, and the ability and learning which they displayed in the discussion, it is, perhaps, one of the most interesting cases, on a mere technical rule of law, that is to be met with in the annals of our jurisprudence. He says the reasons of the House of Lords for setting aside the sale are not given, and we are left to infer them from the arguments upon which the appeal was founded. They have now appeared in the eloquent and learned opinions of Lord Thurlow and Lord Chancellor Loughborough. The perusal of these opinions would have satisfied the learned Chancellor that his views of the case, as one of high authority and great interest, were eminently correct. The appellants were an insolvent company, and their estate was sold by the order of the Court of Sessions at a public judicial sale to satisfy creditors. The course, at such sales is to set-up the property at a value fixed upon by the court, which is called the up-set price, and which is founded on information procured by the common agent of the court who has the management of all the out-door business of the cause. The respondent in the case was the common agent, and he purchased for himself at the up-set price, no person appearing to bid more, and the sale was confirmed by the court; and in the course of eleven years' possession he had expended large sums for building and

improvements. There was no question as to the fairness or integrity of the purchase. The object of the appellant was to set aside the sale, on the ground that the purchaser was the common agent in behalf of all parties to procure information and attend the sale, and was in the nature of a trustee, and so disabled to purchase.

On the part of the appellants, it was contended that the sale in question was *ipso jure* void and null, because the respondent, from his office of common agent, was under a disability and incapacity, which precluded him from being a purchaser. The office of common agent, in a sale, infers a natural disability, which, *ex vi termini*, imparts the highest legal disability, because a law which flows from nature, being founded on the reason and nature of the thing, is paramount to all positive law. The principle is obvious. He cannot be both judge and party. He cannot be both seller and buyer; he cannot serve two masters. These views were not controverted by the counsel on the other side, but they insisted, the sale could be maintained upon other grounds. After an argument of sixteen days, the case was decided in the House of Lords, opinions being given by Lord Thurlow and Lord Chancellor Loughborough.

Lord Thurlow said, on this point, that all the gentlemen admit that it was the duty of the agent to carry on the sale to the utmost advantage, for the benefit of the creditors, and those interested in the residue; and, taking it to be so, one side said, that being your situation, it is utterly impossible for you to perform that duty in such a manner as to derive an advantage to yourself. This seems to be a principle so exceedingly plain, that it is in its own nature indisputable, for there can be no confidence placed, unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it, if you apply an arbitrary rule. In these views, the Lord Chancellor concurred, and the sale was set aside. Lord Eldon and Sir W. Grant designate this as *the* great case, and repeatedly refer to it. In *Jeffrey* vs. *Aitken*, decided in June, 1826, the Lord Ordinary observed, it is impossible to hold that the seller can also be the buyer of the subject, after the judgment of the House of Lords, in the case of the *York Building Company* vs. *Mackenzie*, decided May 13, 1795.

In *Taylor* vs. *Watson*, decided in Scotland, January 20, 1846, the same rule as laid down in Mackenzie's case, was reiterated and adhered to. Lord Jeffrey said, "the principle involved in this case is a very familiar and general one in our laws, that no person can be *actor* in *rem suam*. The stringency of the maxim has been ruled and held settled by the House of Lords, in the case of Mackenzie. * * * It is now *presumptio juris et de jure*, that where a person stands in these inconsistent relations of both buyer and seller, there are dangers, and it is not relevant to say that it is impossible there could be any in the particular case. I should be sorry to think that any doubts were thrown on this rigorous principle which has been established both here and in the other end of the Island."

In the case of the *Aberdeen Railway Company* vs. *Blaikie*, July 20, 1854, 1 MacQueen Rep. 461, the House of Lords, reversing the judgment of the court below, held that a contract entered into by a manufacturer for the supply of iron furnishings to a railway company of which he was a director, or the chairman at the date of the contract, was invalid, and not enforceable against the company.

Lord Cranworth, in delivering the opinion of the court, says: A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation, whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust*, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even, at the time, have been bet-

ter. But still so inflexible is the rule, that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform."

The same subject has had a full and careful discussion and examination in the Supreme Court of the United States, in the case of *Michoud* vs. *Girod*, cited *supra*. The opinion of the court, by Mr. Justice Wayne, is distinguished for its clear analysis and elaborate review of all the cases bearing on the point. He says "the rule, as expressed, embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the persons with whom he is dealing, or on whose account he is acting, and his own individual interest." The same rule obtains in the civil law, with some modifications not necessary to notice.

The language of Pothier is distinct and unequivocal: "Nous ne pouvons acheter, ni par nous-mêmes, ni par personnes interposées, les choses que font partie des biens dont nous avons l'administration." Tr. du Contrat de Vente, part 1, p. 13. The rule of the civil law, without qualification, is adopted in Holland: "Quae vero de tutoribus cautâ, ea quoque in curatoribus pro curatoribus, testamentorum, executoribus, aliis similibus, qui aliena gerunt negotia, probanda sunt." In Spain the rule is enforced without relaxation, and with stern uniformity. Judge Wayne, in the case of Michoud, in his opinion, cited the rule from the Novissima Recopilacion, in these words, "no man who is testamentary executor, a guardian of minors, nor any other man or woman, can purchase the property which they administer, and whether they purchase publicly or privately, the act is invalid, and on proof being made of the fact, the sale must be set aside." It is thus seen that the rule by which agents or trustees are prohibited and rendered incapable of purchasing or dealing with the property of their *cestuis que trust*, is one of universal application, justified by a current of strong and high authorities, and is adhered to with stern and inflexible integrity; and the consequence of such dealing and purchasing is, that the agent or trustee is liable at any time, on the application of the *cestui que trust*, and as a matter of course, and without reference to the fairness or unfairness of the transaction, the adequacy or inadequacy

of the price paid, or any other equities of the agent or trustee, to have the sale set aside; such has been the uniform administration of the law in England, and where the civil law prevails, and in this country. No reason is suggested why rules thus founded on the soundest morals, which have been maintained with such uniformity and steadiness, should now be relaxed. On the contrary, it is seen that every consideration arising from circumstances surrounding us, and the unparalleled multiplicity of corporations, who can only act by trustees or agents, and the very large proportion of the wealth of the country invested in them, and placed under the control and management of agents and trustees; forcibly demands of courts of justice a firm adherence to these principles, and a stern application of them to every case coming within the sphere of their action.

Nay, the rule, as applicable to managers of corporations, should in no particular be relaxed. Those who assume the position of directors and trustees, assume also the obligations which the law imposes on such a relation. The stockholders confide to their integrity, to their faithfulness, and to their watchfulness, the protection of their interests. This duty they have assumed, this the law imposes on them, and this those for whom they act have a right to expect. The principals are not present to watch over their own interests; they cannot speak in their own behalf; they must trust to the fidelity of their agents. If they discharge these important duties and trusts faithfully, the law interposes its shield for their protection and defence; if they depart from the line of their duty, and waste or take themselves, instead of protecting the property and interests confided to them, the law on the application of those thus wronged or despoiled, promptly steps in to apply the corrective, and restores to the injured, what has been lost, by the unfaithfulness of the agent. This right of the *cestui que trust* to have the sale vacated and set aside, where his trustee is the purchaser, is not impaired or defeated by the circumstance that the trustee purchases for another. This point is fully discussed by Lord Eldon in *ex parte* Bennett, 10 Vesey, 381.

In this case he held, that as the solicitor to a commission of bankruptcy could not purchase at a sale of the bankrupt's effects, for

the reasons above stated, so a sale made to a person who had requested the solicitor to employ another at the sale to bid for him, was set aside. He said, "If the principle be that the solicitor cannot buy for his own benefit, I agree when he buys for another the temptation to act wrong is less; yet if he could not use the information he has for his own benefit, it is too delicate to hold that the temptation to misuse that information for another person is so much weaker, that he should be at liberty to bid for another." He adds: "Upon the general rule, both the solicitor and commissioner have duties imposed on them that prevent their buying for themselves; and if that is the general rule, it follows of necessity that neither of them can be permitted to buy for a third person, for the court can, with as little effect, examine whether that was done by making an undue use of the information received in the course of their duty, in the one case as in the other. No court of justice could institute investigation to that point effectually in all cases, and therefore the safest rule is that a transaction which, under the circumstances, should not be permitted, shall not take effect upon the general principle, as if ever permitted, the inquiry into the truth of the circumstances may fail in a great proportion of cases."

And the sale for this reason was set aside. This case is referred to with approbation by Chancellor Kent, in *Davoue* vs. *Fanning*, *supra*. It follows, therefore, that if the defendant Sherman was incapacitated to purchase for himself, he was equally incapacitated to act for the defendant Dean, or any other person to make the purchase; and on the authority of this case, if Dean was the sole purchaser, the same would be set aside.

There can be no question, I think, at the present time, that a director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature, towards his principal, and is subject to the obligations and disabilities incidental to that relation.

Robinson vs. *Paige*, 3 Paige, 222; Angell & Ames, on Corp. 258, 260; *Percy* vs. *Milladon*, 3 Louis. R. 568; *Hodges* vs. *New Eng. Screw Co.*, 1 R. I. 321; *Verplanck* vs. *Mer. Ins. Co.*, 1 Ed. Ch. 84, Redfield on Railways, 494; *Benson* vs. *Hawthorne*, 6 Younge

& Collyer, 326; *The York and North Midland Railway Co.* vs. *Hudson*, 16 Beav. 485; *Aberdeen Railway Co.* vs. *Blaikie*, 1 McQueen's Rep. 461.

In the latter case, Lord Cranworth said: "The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting." Says Vice-Chancellor McCoun, in the case of *Verplanck* v. *Ins. Co. supra*, "But when a corporation aggregate is formed, and the persons composing it, either in virtue of the compact or by the express terms of the charter, place the management and control of its affairs in the hands of a select few, so that life and animation may be given to the body, then such directors become the agents and trustees of the corporation, and a relation is created, not between the stockholders and the body corporate, but between the stockholders and those directors, who, in their character of trustees, become accountable for any wilful dereliction of duty, or violation of the trust reposed in them. I see no objection to the exercising of an equity power over such persons, in the same manner as it would be exercised over any other trustees."

Neither are the duties or obligations of a director or trustee altered, from the circumstance that he is one of a number of directors or trustees, and that this circumstance diminishes his responsibility, or relieves him from any incapacity to deal with the property of his *cestui que trust.* The same principles apply to him as one of a number, as if he was acting as a sole trustee. It is not doubted that it has been shown, that the relation of the director to the stockholders is the same as that of the agent to his principal, the trustee to his *cestui que trust;* and out of the identity of these relations necessarily spring the same duties, the same danger, and the same policy of the law.

In the language of the plaintiff's counsel, it is justly said: "Whether it be a director dealing with the board of which he is a member, or a trustee dealing with his co-trustees and himself, the real party in interest, the principal, is absent—the watchful and effective self-interest of the director or trustee seeking a bargain, is

not counteracted by the equally watchful and effective self-interest of the other party, who is there only by his representatives, and the wise policy of the law treats all such cases as that of a trustee dealing with himself."

The number of directors or trustees does not lessen the danger or insure security, that the interests of the *cestui que trust* will be protected. The moment the directors permit one or more of their number to deal with the property of the stockholders, they surrender their own independence and self-control. If five directors permit the sixth to purchase the property entrusted to their care, the same thing must be done with the others if they desire it.

Increase of the number of the agents in no degree diminishes the danger of unfaithfulness. *Whichcote* vs. *Lawrence*, 3 Vesey, 740, was a case of several trustees. In this case Lord Lougborough says: "There was more opportunity for that species of management, which does not betray itself much in the conduct and language of the party, when several trustees are acting together. I am sorry to say, there is greater negligence where there is a number of trustees."

But it is insisted on the part of the defendants, that the purchase was made at the request of some of the stockholders, and that its alleged ratification at the meeting in June, 1857, by the stockholders, is equivalent to a purchase from them; and this brings me to the consideration of the second class of cases where the trustee buys of, or contracts with his *cestui que trust*. In reference to them, the presumption of law is against the validity of the transaction, with degrees of strength varying according to the circumstances; but the trustee is permitted to show affirmatively the fairness of the transaction, and to establish the other conditions necessary to its validity. The rule on this point is well summed up in the notes to *Fox* vs. *Mackreth*, and *Pitt* vs. *Mack*, in vol. 65, Law Library, page 146: "That the trustee is not under an absolute disability to purchase directly from the *cestui que trust*, but all such transactions are scanned in a court of equity with the most searching and questioning suspicion, and will not be sustained unless they appear to have been in all respects, fair and candid and reasonable." The trustee must show that he took no advantage whatever, of his

situation, that he gave to his *cestui que trust* all the information which he possessed or could obtain upon the subject. That he advised him as he would have done in relation to a third person offering to become a purchaser, and that *the price was fair and adequate*, and the *onus* of proving all this upon the trustee; and these principles apply to all cases where confidence is reposed. To sustain these positions, a large number of authorities are referred to, exclusively American.

Taking, therefore, the ground assumed in the argument, that this was a sale in fact, made by the stockholders, the *cestui que trust*, does it appear that all these requisites were complied with by the purchaser, who stood to them in the relation of confidence? The burthen is on him to establish them, and, if he fails, the sale, though made by the *cestui que trust*, may be set aside on their application.

Has the trustee shown that he took no advantage whatever of his *cestuis que trust*? That he gave to them all the information which he possessed, or could obtain, in reference to the lands sold to him? I have looked in vain for any evidence that such information as he possessed was communicated to the stockholders. Did he advise them as he would have done if a third person had offered to become the purchaser? No evidence of that character is presented. Has he shown that the price was fair and adequate? He is entirely silent on this point, and by that silence admits the truth of the allegation of the complaint, that the price was grossly inadequate. I cannot, therefore, upon these facts and principles, say that this sale can be upheld, even if it had been made by the *cestui que trust* directly. But it is said that the stockholders at the meeting of June, 1857, ratified and confirmed the sale and contract.

It must be borne in mind, that at this meeting the stockholders were dealing with their trustee, and that all the duties incumbent on him when negotiating a purchase from his *cestui que trust* devolved with equal force on him when seeking a ratification of a sale made to him by himself as a trustee, with the aid of his co-trustees.

I am now regarding the law as applicable to a ratification made by stockholders themselves, or a majority of them. I shall hereafter

consider whether a majority of the stockholders made such ratification, and whether it was competent for the majority to make the same, or to bind the minority. The rules as to confirmation of a sale to a trustee by the *cestui que trust*, are concisely laid down in Lewin on Trusts, 97 Law Library, p. 402. They are: 1. The confirming party must be *sui juris*, not laboring under any disability, as infancy or coverture. 2. The confirmation must be a solemn and deliberate act—not, for instance, fished out from some expressions in a letter, and particularly when the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the Court will watch it with the utmost strictness, and not allow it to stand but on the very clearest evidence. 3. There must be no *suppressio veri*, or *suggestio falsi*, but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case. 4. The confirming party must not be ignorant of the *law*; that is, he must be aware that the transaction is of such a character that he could impeach it in a Court of Equity. 5. The confirmation must be wholly distinct from and independent of the original contract—not a conveyance of the estate executed in pursuance of a covenant in the original deed for further assurance. 6. The confirmation must not be wrung from the *cestuis que trust* by distress or terror. 7. When the *cestuis que trust* are a class of persons as creditors, the sanction of the major part will not be obligatory on the rest, but the confirmation, to be complete, must be the joint act of the whole body."

All these propositions are sustained by numerous authorities, and are believed to be sound law, and of universal recognition.

Applying these principles to the present case, has the party seeking the confirmation of the stockholders to this sale and contract, shewn that these essential pre-requisites have been complied with on his part? I do not understand it to be pretended that all the facts and circumstances of the case were made known to the stockholders at this time. It is not asserted that the statement made by Mehaffey to the stockholders at their meeting in June, 1856, that the whole consideration of this sale, $140,000, had been paid in

money, and that $112,000 thereof had been applied in the extinguishing of that amount of bonds of the plaintiffs, and which was undeniably incorrect and well calculated to deceive and impose on the stockholders; was, in fact, untrue, and they so understood it. Can I assume that the defendant Sherman was ignorant of this report and this incorrect statement? If he had knowledge of them, it was clearly his duty, when he sought the stockholders to obtain from them a confirmation of this sale, to have made them acquainted with the material facts as they truly existed. Not having done so, it was *suppressio veri*, and whether made designedly or not, is equally fatal, and the confirmation, if obtained, will not avail him.

The confirmation must not have been made in *pursuance* of the original transaction, or under the influence of that transaction, *Wood* vs. *Downs*, 18 Vesey, 125; or under the same state of circumstances which produced that transaction. *Crowe* vs. *Bellard*, 1 Vesey, 215.

A confirmation given under the idea that the original transaction was valid when it was not, will be set aside. *Roche* vs. *O'Brien*, 1 Ball & B., 338. *Gowland* vs. *De Faria*, 17 Vesey, 18. *Dunbar* vs. *Frederick*, 2 Ball & B., 317.

It is very doubtful, I think, whether the confirmation or ratification of June, 1857, if made with all the conditions, and under all the circumstances required, was an act either of the corporation or of the stockholders. To make it binding on the former there must have been, according to the charter, a quorum of the stockholders, and in corporations having stock, each share is deemed a stockholder, and a majority of shares present or represented is a majority of the stockholders. A very large proportion of stockholders, represented at that meeting were there by attorney, and the power given only authorized them to vote for the election of directors. It did not authorize them to bind their principals to acts and in reference to matters not authorized or assumed by the power. The ratification or confirmation, by such attorneys or agents, having no power to act in the premises, neither bound the corporation nor the stockholders for whom they thus, without any authority, assumed to act.

But even if the confirmation had been legally made, and by a majority of the stockholders, which it clearly was not, when, as in this case, it was to be made by a class, the sanction of a major part will not be obligatory on the rest, but the confirmation to be complete, must be the joint act of the whole body. *Ex parte Lacey*, 6 Vesey, 622; *Ex parte Lacey*, ibid, 628; *Ex parte James*, 8 Vesey, 337; *Davoue* vs. *Fanning*, 2 Johnson's C. R. 264.

At the meeting of June, 1857, certain stipulations of the transportation contracts were relinquished by the defendant Sherman, and it is contended that the acceptance of this release bound the corporation and the stockholders to the contracts, and operated as a ratification of the same.

What would have been its effect had the defendant Sherman stood in the attitude of a stranger to the plaintiffs and the stockholders, it is not necessary to determine. But in view of their actual relations, and in accordance with the principles above stated, as applicable to confirmations, in such cases, it can have no binding effect. Sherman, in his affidavit, speaks of the release proposed to be given as "his concession or consent to modify" the original transaction. He also says that when Grosvenor, one of the stockholders, questioned the transaction, he (Grosvenor) admitted that the plaintiffs "had no claim on said Sherman and Dean to change or modify said agreement. * * * And, thereupon, Sherman consented to make said modification." Mehaffey swears that "he did not contemplate" the subject coming up at the stockholders' meeting, in June, 1857; that, "on the contrary, he regarded it as having been definitely settled, approved of, and ratified by the stockholders;" that it was brought up by Grosvenor; "that said Grosvenor observed, that whilst the stockholders had no claim, and could not claim it as a right, that Sherman and Dean should modify said contract," &c. Riley, a stockholder, who attended the meeting in June, 1857, says that he was not aware, nor does he believe any of the stockholders were aware of their legal rights, or that they had any claim to have the deed and contracts, to use his own expression, "ripped up;" that no resolution was passed or offered at said meeting approving said contracts and sale.

It is very apparent that no actual ratification or confirmation took place, and I am unable to see that anything was done which would authorize one to be implied. Even if obtained, Sherman was dealing with his *cestuis que trust* and standing on the original transaction, claiming its validity and binding character; and his *cestuis que trust* believing it so to be, he is debarred, on the authority of the cases already cited, from claiming any benefits from such confirmation, even if it had been made as distinctly and unequivocally as he pretends.

After a most patient investigation of the facts in this case, and the numerous authorities cited in the protracted and very able arguments made by the learned counsel for the respective parties in this cause, I have arrived at the conclusion, entirely clear to my own mind, that this deed of sale and contract cannot be sustained. To hold otherwise, would be to overturn principles of equity which have been regarded as well settled since the days of Lord Keeper Bridgman, in the 22d of Charles the Second, to the present time—principles enunciated and enforced by Hardwicke, Thurlow, Loughborough, Eldon, Cranworth, Story, and Kent, and which the highest courts in our country have declared to be founded on immutable truth and justice, and to stand upon our great moral obligation to refrain from placing ourselves in relations which excite a conflict between self-interest and integrity.

I have arrived at this result without considering the question of fraud raised in the complaint, and denied by the answering affidavits. I have chosen to place my decision on higher and more satisfactory grounds. I adopt the language of Lord Eldon in *ex parte James*, 8 Vesey, 345: "It rests upon this, that the purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance, as no court is equal to the examination and ascertainment of the truth, in much the greater number of cases."

There may be fraud, as Lord Hardwicke observed, and the party not be able to prove it. To quote Chancellor Kent: "It is to guard against this uncertainty and *hazard* of abuse, and to remove the trustee from temptation, that the rule does and will permit the

cestui que trust to come *at his own option*, and, without showing any actual injury, insist upon the experiment of a re-sale. This is a remedy which goes deep and touches the very root of the evil. It is one which appears to me, from the cases which have been already cited, and from those which are to follow, to be most conclusively established." The trustee purchased with this clog upon his title, and with a knowledge that his *cestui que trust* might, at his option, in the absence of all fraud, apply within any reasonable time to have the sale vacated.

For the reasons herein stated, I have no doubt such are the rights of the present *cestuis que trust*, the plaintiffs in this suit, and they having established a *prima facie* right to have the deed and contracts cancelled, and the lands sold reconveyed to them, it is my duty to restrain the defendants until the hearing of this cause, as asked for in the complaint and supplemental complaint.

The plaintiffs have the right to their real estate, or anything into which it has been transmuted. It is therefore proper to restrain the defendants from transferring the stock owned by them in the Hoffman Coal Company, which but represents the real estate of the plaintiffs, and the privileges and advantages secured by the transportation contract. The motion for an injunction is therefore granted.

In the Supreme Court of Maine.

SARAH DICKEY *vs.* MAINE TELEGRAPH COMPANY.

1. When a highway is laid out and opened, all persons have a right to pass upon it at their own risk, before any work is done upon it, or any travelled path made by the town.
2. The duty of the town to make a travelled path is distinct from and subsequent to the laying out and acceptance.
3. The right of travellers to use any part of the highway is not restricted by the limitation of the liability of the town in case of accident; but such traveller may use any part of the highway.

4. No private person or corporation has a right to place, or cause any obstruction within the limits of the highway, by which any part would become more dangerous to the traveller than in a state of nature, or as left by the town. The extent of the liability of the town is not the measure for such private person's liability.

5. A telegraph company that is authorized by its charter to construct its line "along and upon any highway," by the erection of posts for sustaining the wires, but not to be so constructed as to incommode the public use of the highway, may be responsible for damages to an individual, occasioned by such erection if improperly made, or by suffering the same to fall down, or be out of repair, although thereby the use of the path made and used in the centre of the highway, is not obstructed.

This was an action for damages to the plaintiff, occasioned, as alleged, by negligence of the Telegraph Company. The evidence in the case tended to show that the posts and wires of the company were placed near the exterior limits of the highway, and along the highway. That at the place where the injury happened, the wire passed near and in front of a house, where a post office was kept—that the wire at that place had fallen towards the earth, by reason of the posts giving way and inclining towards each other—that the company had been notified of the defect several times—that plaintiff was a passenger in the mail stage coach, which was upset when attempting to pass from post office door under the wire, and plaintiff injured. The jury found that the driver was using proper care.

N. Abbott, for plaintiff.

A. W. Paine, for defendant.

The opinion of the court was delivered by

KENT, J.—The application of a few well-established principles to the facts in this case, will aid in testing the correctness of the rulings to which exceptions are taken.

When a highway is laid out and opened, all persons have a right to pass upon it. By the legal laying out, and after all the requirements of the statute have been complied with, the public acquires an easement, as against the owners of the land, which extends to every portion of the road; and any person has a right to pass or repass, at his own risk, over any part, after it is opened and before any work is done or any travelled path made, and before the liability

of the town to make it exists. When laid out and accepted, it becomes a public highway. *State* vs. *Kitting*, 5 Me. 259.

The duties of the town in relation to preparing the way for travel are distinct from and subsequent to the laying out. The law requires the town to make and keep in repair a travelled path of sufficient width. It does not require the town, ordinarily, to make that travelled path the whole width of the road; and towns will not be liable for obstructions on the portion of the highway not constituting the travelled path, or not so connected with it as to affect the safety of the travelled portion. *Bryant* vs. *Biddeford*, 39 Me. 193.

But the right of travellers to use any part of the highway, if they see fit, is not restricted by the limitation of the liability of the town in case of accident. A person may go out of the beaten track at his own risk, as between himself and the town, and yet be entitled to protection against the unlawful acts of other persons or corporations. Any part of the highway may be used by the traveller, and in such direction as may suit his convenience or taste. *Stinson* vs. *Gardiner*, 42 Me. 48.

No private person has a right to place or cause any obstruction which interferes with this right, on any part of the highway, within its exterior limits. The extent of the liability of the town is no measure for such private person's liability. If the owner of the fee in the land, or any other person, should dig a pit, or stretch a cord, or place a pile of stones on the highway, near the outer limit, and at a considerable distance from the travelled path, and a traveller passing, using due care, should be injured thereby, it would be no sufficient answer to his claim for damages to aver and prove that, under the circumstances, the town was not liable. The duty is to perform a positive act in the preparation and preservation of a sufficient travelled way. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous to the traveller than in a state of nature, or than in the state in which the town has left it.

It may be true that, in many cases, the same principles will be applied both to towns and individuals, in determining whether a

given state of facts, in relation to a particular incumbrance, constitutes a defect within the meaning of the law. But admitting the defect, the question of liability for creating or allowing it, may require, for its solution, the application of very different principles in a case against a private person, from those which would apply to a town.

We think that the instructions of the presiding judge, in relation to the right of all persons to travel on any part of the highway, or to leave the usually travelled path, for the purposes indicated, were entirely correct as applied to this case, between an individual and a corporation other than a town.

Any other construction would deprive a traveller of the legal right to turn out of the beaten track to avoid defects, or to call at houses, stores, or fields. If he has not such legal right, thus, as against the owner of the fee in the land over which the highway is located, he would be a trespasser. The only right which the public has is to pass and repass. A horseman cannot stop to allow his horse to graze, without being a trespasser. *Stinson* vs. *Gardiner*, 42 Me, 254. If, when he has turned from the usual travelled path, he is not rightfully travelling over the spot, he can claim no damage against an individual who has wilfully placed obstructions or impediments on that part of the highway. If he has a legal right to be there, then the individual wrong-doer may be responsible, although the town may not be.

The defendants invoke the provisions of their charter, and contend that, by its terms, they are exempted from all liability for any neglect or defect outside of the travelled way, and that they stand in the same condition as the town. The charter, § 2, authorizes the company to locate and construct its line along and upon any highway, * * * * * by the erection of the necessary fixtures, including, posts, piers or abutments, for sustaining the wires or conductors of such line; but the same shall not be so constructed as to incommode the public use of said road or highway."

The defendants contended that the "public use of the highway is the right which the great public owns in distinction from the private right which individuals have of passing out of the travelled path."

We cannot concur in this view. The public use of the highway is the right which has been before defined, viz.: the right of any and all persons to use the highway, to pass and repass at their pleasure, on any part. It is not confined to that portion which the town is, by law, compelled to make and keep in repair.

It is very clear that this company could not legally erect posts a foot only in height, and extend the wires at that distance from the ground, on the exterior limits, and outside of the travelled path, if, by so doing, the use of any part of the highway was obstructed or rendered inconvenient and dangerous, or the traveller incommoded. If any injury should arise to any such legal traveller by such erections, the company would be liable to him. The same rule would apply when, after erections properly made, they suffer the same to fall down, or to be out of repair, and to remain so after reasonable notice, so as to obstruct the traveller and endanger his safety.

The instructions on this point were clear and distinct, and in our view correct. Exceptions overruled.

In the Supreme Judicial Court of Massachusetts—Suffolk County, Law Term—January Term, 1860.

SAMUEL H. GOOKIN *vs.* NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY.

1. In an action upon a policy of insurance on a vessel for one year, commencing the risk on the 27th May, 1854; and "if at sea on the expiration of the year, the risk to continue at a *pro rata* premium until her arrival at port of destination," it was held, that the proper construction of such policy was that, if the vessel was, at the expiration of the year, in any port, or if then at sea upon her return to a port, although it was an intermediate port to which she had resorted for the purpose of the voyage, and not her home port or port of final destination, the policy ceased to be effectual, and would not cover a loss subsequently occurring.

2. The vessel thus insured having gone to San Blas, and there obtained a license to take in a cargo of Brazil wood at Ypala, where she arrived eight days before the expiration of the year, and there remained actually engaged in taking in her cargo for nine days, and while thus remaining there, after the expiration of the year, was lost. It was held, that such vessel was not at sea at the expiration of the year, and the insurers not liable for the loss.

The facts of the case will sufficiently appear in the opinion of the court, which was delivered by

DEWEY J.—This is an action brought on a policy of insurance, by which the defendants insured the plaintiff $8,750, on the ship Water-Witch, for one year, "commencing the risk on the 27th day of May, 1854, at noon; if at sea on the expiration of the year, risk to continue at pro rata premium until her arrival at port of destination."

The ship being at San Francisco, in California, was chartered by the captain from thence to the port of San Blas, in Mexico, and there "getting a license to load Brazil wood at Ypala, to proceed to the latter port or place, there to take a full cargo of Brazil wood, and proceed direct to New York or Boston."

The vessel under this charter went to San Blas, got there the license to take in the cargo of Brazil wood at Ypala, sailed from thence for Ypala, where she arrived May 19, 1855, commenced taking in her cargo there on the 21st, proceeded in loading till about the 30th, and was totally lost, by being driven on the rocks at Ypala, on the first of June, the year for which she was insured having expired on the 27th of May.

By the charter-party, New York or Boston was the ultimate port, and San Blas and Ypala intermediate ports of destination.

The question is, whether this policy was in force on the first day of June, 1855. It is contended, on the part of the plaintiff, that the conditional extension of time covers the vessel during the entire round voyage, to her return to Boston, and that she would be "at sea" until her arrival at such final port, no matter how many intermediate voyages from port to port she might have made after the expiration of the year. On the other hand, on the part of the defendants, it is insisted that if the vessel was, at the expiration of the year, in any port, or if then at sea, whenever she should return into port, although it was an intermediate port to which she had resorted for any purposes of the voyage, the conditional extension of the time beyond one year was of no further effect. The general character of this policy would seem to be that of a time policy. As such it has the privilege of greater latitude in the voyage, and free-

dom of risk from loss of insurance by deviation or change of purpose as to the particular ports to be visited. But with these benefits there comes also, the inconvenience of the limitation of time stated in the policy, which may expire before the contemplated round voyage has been fully accomplished. The distinction between the two classes of policies, those on time, and those for a round voyage, are well recognized, and may, perhaps throw some light upon the inquiry, whether this policy was to continue until the whole voyage was completed, and the vessel moored in safety on her final return to her home port in the United States. As an original question, the proper view to be taken of this policy, as it seems to us, would be to consider it as a time policy, intended, by the parties, to continue one year, and then to expire wherever the vessel might be at the expiration of that time, if then in port anywhere, and that the stipulation to continue longer than a year, if then at sea, must naturally be taken to be a provision of a limited and temporary character, defeasible on her return to a port, and not one that would give the policy the indefinite duration attaching to a policy for a round voyage.

The plaintiff relies upon the case of *Wood* vs. *New England Marine Insurance Company*, 14 Mass. 31, as decisive of the present case. The broad doctrine is there found stated in the opinion of the court delivered in that case, "that a vessel is 'at sea' within the meaning of that clause in the policy, while on her voyage, and pursuing the business of it, although, during a part of the time she is necessarily within some port in the prosecution of her voyage."

To this case as an authority, it is objected, however, that the facts thereof well authorized the plaintiff to maintain his action independent of any such doctrine as was stated in the opinion of the court, and now relied on as an authoritative adjudication of the present question. Its value as an authority for the present case, must depend very much upon the precise question there presented, and necessarily arising upon the facts.

The policy in that case was for twelve calendar months, from 24th December, 1806, with a memorandum at the foot of the same,

"should the vessel be at sea at the expiration of the above period, the risk is to continue until her arrival at a port of discharge." The question which seemed to have received the more full consideration of the court, was that as to the liability of underwriters for a loss arising from an alleged violation of the Milan decree. It appeared that the vessel was in the port of Bristol from 25th December, 1807 to the 20th January, 1808, having been captured by a British private armed ship, and carried there by her captors, under pretence that she was bound to an enemy's port.. The vessel proceeded to sea, from Bristol, 20th January, 1808, and was subsequently captured by a French privateer. The court held, that the clause of the policy "should the vessel be at sea at the expiration of the year, the risk is to be continued until her arrival at a port of discharge," continued the policy, though the vessel was, at the expiration of the year, in the port of Bristol, being brought there by a private armed ship against the will of the master, so that a loss having occurred on her voyage from Bristol to Amsterdam, her original point of destination and discharge, the insurers were liable. The case presented this peculiar feature that does not exist in the present case, that the vessel was by an armed force carried into port, against the will of the master. The only port to which she had arrived, and which could be said to have taken her case out of the condition of a "vessel at sea," was this port of Bristol, to which she was wrongfully carried by superior force. But the extension in case she was at sea, was to continue "until her arrival at a port of discharge," and Bristol was not her port of discharge. It was Amsterdam, and she was lost by one of the perils insured against, before reaching Amsterdam. The case was, therefore, one directly falling within the condition of being "at sea," on her direct voyage from Beverly, her place of departure, and if her putting in and stay at Bristol, was by reason of its being by an armed force, and against her will to be considered as the termination of the voyage, or arrival at a port of discharge, the plaintiff might well be entitled to recover on his policy. No such question arose, as whether, under that policy, the underwriters would have been liable for a loss occurring on a return voy-

age from Amsterdam, commenced after the expiration of the year. The vessel never reached Amsterdam, her first and intermediate port of destination. The only point, therefore, required to be decided in that case, was whether the vessel not having reached Amsterdam within the year, and having been in a port only as carried there by force by a British private armed vessel, was within the meaning of the policy, "at sea" at the expiration of the year—assuming the putting in and stay at Bristol to be an act for which the assured was not responsible, and one not affecting the policy, the case was clearly for the plaintiff as to the duration of the risk, and this without deciding the further question now raised.

Upon the more general question the subject of the present inquiry, no authorities were cited. Indeed, the ground taken by the plaintiff's counsel would seem to have been merely that while under this illegal seizure and detention, and the consummation of her voyage to Amsterdam having been thereby prevented, such detention and carrying into a port would not be an arrival at a port of discharge within the contemplation of the parties to the policy. The cases cited by the counsel on that hearing, of *Scott* v. *Thompson*, 4 B. & P., and *Robinson* vs. *Marine Insurance Co.*, 2 Johns, 89, were only to that point. No authority, it is believed, could then or can now be found to support the broad proposition now contended for by the plaintiff, unless it be the case of *Wood* vs. *New England Marine Insurance Co.*, 14 Mass. 31. We look in vain for any English cases bearing upon the subject. Our own case of *Bowen* vs. *Hope Insurance Co.*, 20 Pick. 275, furnishes no authority for this doctrine. The case of *Wood* vs. *New England Marine Insurance Co.*, was referred to in the opinion pronounced in that case, but merely as a case where it had been decided that a vessel might be deemed "at sea" while on a foreign voyage, though the vessel had been captured and detained in a foreign port, and it was so detained until after the expiration of the year, and her voyage to her port of destination and discharge delayed thereby, and upon resuming her voyage after the year, she might be considered as entitled to all the privileges of "being at sea" during her illegal detention. The case of *Bowen* vs. *Hope Insurance Co.*, was this;

an insurance was effected to the amount of $5,000 on the brig "at and from Boston, to and at all ports and places to which she might proceed for one year, from 6th October 1834, and if the vessel should be at sea when the year expired, then the risk was to continue until her arrival at her port of destination and discharge." The vessel, on the 22d day of June, 1835, sailed for Rotterdam, from which place she was to proceed to Bangor in Wales, for a cargo of slates, and thence to Boston, and on her return passage from Bangor to Boston she sustained damage by perils of the seas, for which the action was brought. The defence was, that the vessel was at Bangor at the expiration of the year. It was conceded that she was there and in prosecution of her voyage, and with the intention of proceeding on the same. On 25th September, 1835, she had dropped down several miles below Bangor, but was detained by head-winds and came to anchor, and did not actually get to sea until the 8th October, two days after the year expired. The question argued and decided was, whether the vessel had sailed or commenced her voyage from Bangor previous to 8th October, and the court held, enough was done to put the vessel "at sea" within the terms of the policy before the expiration of the year. This question was directly considered by the Supreme Court of New York, and subsequently by the Court of Errors, in the case of *Hutton* vs. *American Insurance Co.*, reported in 24 Wendell, 330, and 7 Hill, 321. It was a suit upon a time policy on the Brig Champion, for twelve calendar months, commencing 21st January, 1835, and "if at sea at the expiration of the term, the risk to continue at the same rate of premium until her arrival at the port of destination." She sailed from New York, intending to proceed to St. Barts and Curacoa, and then return to the United States. After landing at those places she went to St. Thomas for the purpose of taking in her cargo, where she arrived 6th January, 1836, and remained there until 22d January, being necessarily detained during that time for repairs. She then commenced taking in a cargo, and sailed from thence for New York on 30th January, but was stranded and left on the voyage. It was held by the Supreme Court of Errors, that she was not "at sea" when the time specified in the policy expired, but in

a port of destination, and that the underwriters were therefore discharged. It was there contended on the part of the plaintiff, that the parties must have contemplated the home-port as the port of destination, and that the provision "if at sea" at the end of the year, then to continue until her arrival at the port of destination, was intended to afford protection to the vessel until her arrival at her home-port in New York, and that during the whole period of her absence in the prosecution of her trading voyage, the vessel was at sea within the true meaning of the policy, including as well the time of her detention in port, as the time of her sailing on the high seas.

It appeared in that case, the vessel had made her arrangements for returning to New York, and was contracting for freight before the year expired. In that case it was held by both these tribunals, that such policy would expire by its limitation whenever the vessel was at an intermediate port after the expiration of the year, and the term "if at sea" did not extend the policy to her arrival at her home port of destination. Chancellor Walworth, in giving his opinion, says, "the term sea is necessarily put in contrast with a port of destination." "Her last port of destination when at sea, was St. Thomas, for she intended to go there for the cargo of coffee. Upon the construction contended for by the plaintiff, if the vessel had been at Baltimore on 21st January, 1836, she might have taken in a cargo upon the usual trading voyage by way of Cape Horn and the Pacific to the East Indies or China, and back by England to New York. In fact, there would be no termination of the risk until the vessel was actually lost, so long as she continued to carry freight from port to port without returning to New York, where it is said the plaintiff resides."

The answer to the case of *Wood* vs. *New England Marine Insurance Co.*, which was cited to that court as a decision upon that question, the Chancellor says, "the actual decision in the Massachusetts case cannot well be questioned, although the language of the judge who delivered the opinion of the court went much farther than was called for by the facts in the case on the terms of the policy. The loss occurred there before she reached her port of discharge.

But if Amsterdam was intended to be a port of discharge of that vessel, and the twelve months after she had arrived in safety at that port, I cannot concur in the opinion of the learned chief justice that the terms of the policy would have continued the risk until the return of the vessel to the port from which she sailed from the United States." In the same case in the Supreme Court of New York, it was held that "at sea" was used in opposition to being in port; and arriving at the "port of destination," means any port of destination whether at home or abroad for lading or discharge, or any other object of business voluntarily pursued. In *Eyre* vs. *The Marine Insurance Co.*, 6 Wharton, 247, the Supreme Court of Pennsylvania, in a case where the vessel was insured "for and during the term of twelve calendar months, ending on the 10th November, 1828, with liberty of the globe, and if at sea the risk to continue at the same rate of premium until her arrival at the port of destination in the United States," held that upon a proper construction of the terms of the contract, the underwriters were not liable after the expiration of the year, unless the vessel was in fact on her voyage to her port of destination in the United States; that it was a contract for a limited period, and extended beyond the year only in the case the vessel was at sea on her voyage to a port in the United States.

The vessel had sailed on a voyage from Rio Janeiro in South America to the Island of Jersey in the British Channel, leaving on the 10th November, 1838, and had while at sea on this voyage suffered the damage for which the action was brought. The court says, that the plaintiff's construction strikes time out of the agreement, and if the intention of the parties had been as alleged by the plaintiff, no period of time should have been introduced, as it has no effect. This case differs from those we have been considering, and limits more strictly the privilege of the ship if "at sea," as she was in fact "at sea," on the day the policy expired, but as the court held, on a voyage without the terms of the contract. This case subsequently, was again before the court, 5 Watts & Serg. 116, upon the question of the competency of evidence of usage among merchants and insurers, that a voyage described as this was in the

policy, was understood to be an insurance that would cover a voyage from a foreign port to another foreign port, which had been commenced within the year, and the ship was lost on such voyage, and it was held that such evidence of usage was competent. The usage here offered to be shown does not, however, reach the present case. It was only to show that a vessel might be "at sea" at the expiration of the policy, if then sailing to a foreign port. This the defendants do not deny, but say, that after reaching that foreign port in safety after the year, or when she is actually in such foreign port at the expiration of the year, the limitation takes effect. That the term port of destination is applicable to any foreign port at which a vessel may have arrived in the course of her voyage is clearly recognized in various cases where the subject of seamen's wages has arisen. 2 Dane's Abridg, 461; *Thompson* vs. *Faucet*, 1 Pet. C. C. 182; *Giles* vs. *Brig Cynthia*, 1 Pet. Ad. 203; *Blanchard* vs. *Buckerman*, 3 Greenlf. 1.

The Supreme Court of New York, in *Union Insurance Company* vs. *Tyson*, 3 Hill, 118, in a case where there was a provision extending the policy, "if at sea, until the arrival of the vessel at her port of destination in the United States," had held that the language fixed the port of destination to be the home port in the United States. The case of *Hutton* vs. *American Insurance Company*, 7 Hill, *supra*, did not, so far as I learn, question the character of such a policy, while it gave an entirely opposite construction to a policy like that in the present case. We have no doubt the policy might have been so drawn as to cover the risk incurred during the whole voyage and return to the home port, notwithstanding the vessel might have been at an intermediate port at or after the expiration of the year. But, in such case, it would much more resemble a voyage policy than a time policy, and time might as well be stricken out of the policy. But here the policy was one with the time of its duration limited to the period of a year. It is true that there was a condition, but this should be read as a condition adapted to a time policy. There is really no limitation if it be not the first arrival of a vessel from sea in any port, after the expiration of the year. Giving it this construction, you leave it to time policy with the reasonable condition, and one suit-

able and proper, to give opportunity for learning as to the state of the ship, and procuring new insurance, or if lost on a voyage not completed by her return to a port, of charging the loss upon the insurers, without any embarrassment in fixing the precise day of the loss, and showing that it was previous to the expiration of the year.

As it seems to us the proper construction of the policy in the present case is, that if the vessel was, at the expiration of the year in any port, or if then at sea, whenever she should return into port, although it was an intermediate port to which she had resorted for the purposes of the voyage, the conditional extension of the time beyond one year ceased to have any further effect, and that such policy could not cover losses occurring at any period subsequent, or the vessel be considered at sea at all times until her return to her home port. The further inquiry is, was the Water-Witch at an intermediate port of destination on 27th May, 1855, when the year expired. She arrived at Ypala on 19th May, commenced taking in her cargo on 21st May, and proceeded in the business of loading till the 30th May. She went then voluntarily, and under the charter party by which she was to go to Ypala, and there take a full cargo of Brazil wood. This was the situation of the vessel when the year named in the policy expired. But, it is said on the part of the plaintiff that Ypala is not a port of entry, nor a port in any legal sense—not a haven—not a port, as described by Lord Hale. It is conceded that it is not a port of entry and clearance, and has no custom house, that there is no haven or harbor there, and that part of the coast where Ypala is situated, lies open to the sea. In the charter party it was described thus, "getting a license to load Brazil wood at Ypala; to proceed to the latter port, or place, and there to take a full cargo of Brazil wood." It is a place of trade for Brazil wood, and vessels proceed and stop there for this purpose. The evidence tends to show that Ypala is often called a port. It was so called in the protest in the present case, certified by the local judge. The question recurs, whether Ypala was, within the meaning of the policy, a port of destination? Was the Water-Witch "at sea" during the eleven days she was lying at Ypala taking in her loading? To some purposes certainly, a usual place

of stopping for loading or obtaining a cargo, is a port of destination. To some purposes the term port has in policies of insurance been held broad enough to embrace the case of vessels loading and unloading in an open roadstead, as in *Cockey* vs. *Atkinson*, 2 Barn. & Ald. 460. In the case, *De Longuemère* v. *New York Fire and Marine Insurance Company*, 10 John., 120, the court held that the term port might be properly applied to places resorted to and used for the purposes of loading and unloading cargoes, although they were mere open roads, having no harbors.

In the present case, the Water-Witch had certainly reached her port of destination. She had previously obtained a license to proceed to Ypala, and had accomplished that purpose. She was making no voyage, but was at rest at the place sought, and accomplishing the purpose of her voyage to Ypala, taking in cargo of Brazil wood at her leisure. She had been so situated for eleven days, the last four of which were after the expiration of the year. It is said, however, that she merely stopped on her way to Ypala, in the prosecution of a voyage to New York. This might be equally true if Ypala had been to all intents and purposes a legal port, and an unquestionable intermediate port of destination. It would have been equally true if the vessel had been lost at San Blas, which is conceded to be a port.

This policy, it is to be remembered, was a time policy, expiring by its own limitation in one year, to be extended further only "if at sea on the expiration of the year." If she would not have been at sea, within the meaning of the policy, had she been at the port of San Blas at the expiration of the year, was she any more so when lying at her place of destination for taking in her cargo, at which place she had arrived eight days before the expiration of the year, and had continued there several days subsequent to that period.

Upon the facts as stated by the case presented by the parties, the court are of opinion that the defendants are not liable for a loss occurring to the vessel on the 1st June, 1855; that the condition upon which the extension of the policy was to take effect is not shown to have existed, the vessel not being at sea at the expiration of the year. Judgment for the defendants.